



# **EMPLOYMENT TRIBUNALS**

**BETWEEN**

**Claimants**

**and**

**Respondents**

**Miss C Huggins & others**

**Croma Vigilant (Scotland) Ltd**

## **JUDGMENT AND ORDER OF THE EMPLOYMENT TRIBUNAL**

**SITTING AT: London Central**

**ON: 4, 7 and 8 November 2019**

**BEFORE: Employment Judge A M Snelson**

On hearing Mr J Mann, trade union representative, on behalf of Miss C Huggins, Mr S Sonu, Mr N Touati, Mr C Babalola and Mr I Da Silva, Claimants, Mr J Hitchens, counsel, for Mr O Emuemukoro, Claimant, Mr P Powlesland, counsel, on behalf of Mr S Alaughe, Claimant, and Mr M Keenan, solicitor, on behalf of the Respondents, the Tribunal adjudges and directs that:

- (1) The claims are consolidated.
- (2) The Respondents' response to the claims is struck out.
- (3) The Claimants' complaints of unfair and wrongful dismissal are well-founded.
- (4) The Respondents are permitted to continue to participate in the hearing to the extent of contesting the Claimants' holiday pay claims and their claims for remedies pursuant to para (3) above.
- (5) On the Claimants' claims for remedies in respect of unfair dismissal, the Respondents are ordered to:
  - (a) reinstate the Claimants on or before 27 December 2019; and
  - (b) pay to each Claimant on reinstatement back pay calculated as all sums he/she would have received but for the dismissal between the date of dismissal (28 December 2017) and 27 December 2019, or the date of reinstatement if earlier, less:
    - (i) payments received from the Respondents in that period in respect of annual leave entitlement accrued up to the date of dismissal;
    - (ii) income received from any third party;
    - (iii) any relevant state benefit.

- (6) The Claimants are not entitled to claim pursuant to the Trade Union & Labour Relations Act 1992, s207A(2) an enhancement of the sum referred to in para (5)(b).
- (7) The Claimants' claims for holiday pay (in so far as they are pursued), all outstanding remedies issues and any costs/preparation time issue that may arise are adjourned to a further hearing before an Employment Judge sitting alone at 10.00 a.m. on 6 February 2020, with one sitting day allocated.
- (8) Any party intending to pursue a costs/preparation time application shall, no later than 29 November 2019 deliver such application to the Tribunal with copies to the other parties.
- (9) Any party against whom a costs/preparation time application is made shall, no later than 20 December 2019 set out in writing to the Tribunal, copied to all other parties, whether the application is opposed and, if so, all grounds relied upon for opposing it.
- (10) No later than 31 January 2020 the parties shall notify the Tribunal, preferably by agreement, of all issues and matters to be addressed at the hearing to be held on 6 February 2020.

## **REASONS**

### *Introduction*

1. These reasons (supplied in writing pursuant to an oral request made on behalf of the Respondents) result from adjudications given at a hearing of the claims of Miss C Huggins and six other Claimants against Croma Vigilant (Scotland) Ltd on 4, 7 and 8 November 2019. Originally, there were 16 Claimants. Nine remain. For a reason that does not matter the claim of Mr Lema is to be heard separately (see the Order of EJ Isaacson sent out on 13 May 2019, para 1.1). For reasons explained in the commentary to a separate order, the parallel claim of Mr Y N'Guessan (case no. 2204683/2018) has been detached from the rest and is proceeding separately. The names of the seven Claimants with which these reasons are concerned, and their case numbers, are given in the Appendix below.

2. The Claimants are security officers. They worked for CIS Security Ltd until a TUPE transfer to CE Security Ltd in 2015 and a further TUPE transfer to the Respondents in August 2017. Their engagements were terminated on 28 December 2017 on the stated ground that they had not produced necessary documentation to prove their entitlement to work in their roles.

3. The Claimants were all assigned to sites within the London Borough of Camden, pursuant to contracts between that Borough and the Respondents. Such work is prized by security officers (and, no doubt, others who work on outsourced contracts) because the Borough insists that staff so engaged be paid not less than the London Living Wage ('LLW').

4. By their claim forms, the Claimants brought claims for unfair dismissal, wrongful dismissal (notice pay) and holiday pay. Two at least brought additional claims but all now confine themselves to the three heads of claim just mentioned.

5. This litigation does not have a happy history. It would serve no useful purpose to recite it here. It is sufficient to note that, following a case management hearing before Employment Judge Isaacson on 1 May 2019, much that had been in dispute between the parties (in particular the question of employment status) had fallen away and a timetable had been set leading to a final hearing scheduled for 4-8 November 2019. That final hearing was listed before me. The representatives were as set out above.

*Strike-out*

6. Prior to the hearing there had been an application on behalf of Mr Emuemukoro for the response form to be struck out on account of the Respondents' non-compliance with the directions given on 1 May, but it had not been practicable to deal with it in advance of the hearing. Accordingly, Mr Hitchens renewed it when the case was called on. I decided to read into the case and give the representatives an opportunity to talk. After an interval, the hearing resumed. At that stage, there was common ground that, as a consequence of the failure of Peninsula Business Services ('Peninsula'), the Respondents' representatives, to comply with the case management directions, it would not be possible to conduct a fair trial of the case at any point during the five-day allocation. A massive bundle of documents had been prepared but it did not include the documents which mattered. The Respondents had failed to prepare their witness statements. It was not feasible to remedy these deficiencies in the time available.

7. Mr Hitchens, supported by Mr Powlesland and Mr Mann, submitted that, in the circumstances, the only proper course was to strike out the response, enter judgment for the Claimants and proceed to deal with their remedy claims. He acknowledged that striking-out orders were draconic but contended that such a measure was not only richly merited in this case but also the only way to do justice. The Claimants had lost their jobs almost two years ago and had suffered considerable hardship in consequence. Any further delay would be wholly contrary to the interests of justice.

8. Mr Keenan for the Respondents frankly acknowledged that the case was not ready for hearing purely as a consequence of the failure of Peninsula to comply with the case management orders and to engage with the Claimants' side. He explained that a former colleague had had charge of the matter and had left the organisation without arrangements being made to cover the case. It had simply been overlooked. (We hasten to say that Mr Keenan had nothing whatsoever to do with this unfortunate history and had been entrusted at the eleventh hour with the unenviable task of managing the fallout as best he could.) Putting the matter very simply, Mr Keenan submitted that granting the Claimants' application would inevitably cause substantial prejudice to his clients and invited us to decide that adjourning the proceedings amounted to the lesser of two evils.

9. Under the Employment Tribunals Rules of Procedure 2013, rule 37(1)(b) and (c) the Tribunal has power to strike out a claim or response on (among others) the grounds that the proceedings have been conducted unreasonably or that a party has failed to comply with an order. Where a response is struck out the effect is that the respondent is treated as never having presented a response (rule 37(3)). A respondent who has failed to present a response is entitled to participate in proceedings only to the extent permitted by a judge (rule 21(3)).

10. I reminded myself that the power to strike out is widely drawn but the higher courts have often stressed the fact that the sanction is a severe one, to be used with restraint. That said, there will be cases in which it is a proper course to take, particularly where it is shown that to do otherwise would be to deny justice to another party.

11. I concluded that it was necessary in the interests of justice to make a striking-out order. The alternative would have been an adjournment of many months (the Tribunal's lists are full into the late summer of 2020). That would have entailed unacceptable prejudice to the Claimants. They lost their jobs nearly two years ago. They have sustained considerable losses and in all or most cases those losses continue to grow substantially from week to week. Their first remedy claims are for reinstatement and they are entitled to have those claims determined without more delay. Continuing uncertainty as to whether reinstatement will be ordered would exacerbate the prejudice which postponing the case would entail. Moreover, the Claimants have done nothing to cause or contribute to the procedural impasse: the fact that the case cannot proceed as an effective contest on liability is *wholly* attributable to Peninsula's neglect of its obligations. On the other side of the balance, it must be acknowledged that striking-out will deprive the Respondents of the chance to contest the claims on their merits, but they will have the comfort of what appears to be an unanswerable claim against Peninsula for compensation for all consequential losses. Stepping back, I was satisfied that the factors in favour of granting the Claimants' application comprehensively outweighed those against and that the interests of justice and the overriding objective demanded the adjudication which they had asked for.

12. Having heard my ruling, the parties agreed that the case should be stood over to Thursday, 7 November (day four of the allocation) to allow time for preparation of the evidence needed to deal with the remedies claims. When the hearing was resumed the representatives were agreed that the preparations had been completed and the matter could proceed. This was in large part due to the hard work and co-operative spirit of the representatives on all sides. I was satisfied that it was in the interests of justice to permit the Respondents to participate in the remedies hearing, nothing being said to the contrary on the Claimants' side.

### *Remedies*

13. The Claimants all sought reinstatement orders. Mr da Silva sought in the alternative re-engagement. His case was different from those of the other Claimants because he had been employed in the Housing Patrol Unit ('HPU'), which was disbanded at some point after his dismissal and its work subsumed

within a new Responsive Security Patrol Unit ('RSPU'). The very limited evidence before me did not establish whether, under his contract, Mr Da Silva could have been required to transfer to the new unit.

14. I heard brief evidence from Mr Paul Brady, who has been the Respondents' Contracts manager since he joined them in 2014, and Mr Mann. A modestly-sized bundle was produced but since its contents were mostly directed to the compensation claims of individual Claimants, it was barely referred to.

15. The essence of Mr Brady's evidence was that there was no vacancy on any Camden contract or at Hammersmith & Fulham, the only other public sector contract in London. The Respondents had 138 employees on the Camden contracts at the time of the TUPE transfer to them. The dismissed guards (who seem to have numbered 22) were initially replaced by 'bench officers' (stand-by staff), but the overall number had fallen since then to 120. I received no explanation as to when, why or how. The headcount of the workforce assigned to Hammersmith & Fulham contracts stands at about 30. Across London as a whole, the Respondents employ about 700 security guards. Mr Brady acknowledged that a process of recruitment was underway (or about to start) for security work at Weybridge. Asked if guards assigned to Camden contracts could be moved to Weybridge, he gave an uncertain reply. He produced no evidence as to the mobility terms governing Camden-based employees. He did say that the approval of the Weybridge end-user would be required. He was asked further questions about the terms under which Camden-based employees were working. In particular, were there still 'zero hours' employees working on Camden sites (despite the Borough's disapproval of such contracts)? Mr Brady thought that the number had reduced materially but was unable to offer any specific detail. He explained that his was a strategic London-wide role and he did not have responsibility for managing individual sites or clients. That was for the tier of managers who reported to him. Mr Brady did agree that the general picture was fluid: there is a constant process of bidding and tendering for new guarding contracts.

16. Mr Mann, who has considerable experience as a trade union officer at Camden, stated that there was ample flexibility to enable the eight remaining Claimants to return to Camden duties. He pointed to the continuing use of zero hours contracts which, he said, had not been eliminated or even reduced, despite the Borough's strictures on that matter. The Claimants could replace those employed on such contracts, with no risk to the Respondents. He also said that work was being undertaken without adequate staff levels. In particular, he alleged that the RSPU patrols were supposed to be undertaken by two guards working together but often guards were compelled to go out single-handed, compromising their own safety and that of the public generally.

17. I accept the evidence of Mr Brady and Mr Mann as sincere. But neither was able to offer me much assistance. Neither had details to hand. That was understandable in the case of Mr Mann, whose account was bound to be anecdotal and based on limited material. But in ordinary circumstances one would have expected better of the Respondents than fielding a witness who, through no fault of his own, did not have the key information at his command. To repeat, I

make no criticism whatsoever of Mr Keenan, who is to be commended for playing the poor hand dealt to him as well as it could have been played.

18. For the Claimants, it was submitted that the proper outcome in each case was a reinstatement order. The Respondents' contention that it would not be practicable to comply with such an order was not made out on the evidence. Compensation alone would not be an adequate remedy.

19. Mr Keenan for the Respondents relied on the evidence of Mr Brady which, he said, established that there was no space for the Claimants to fill. It would not be practicable to comply with an order for reinstatement.

20. Although relatively rarely made, re-employment orders constitute the primary remedies for unfair dismissal. That is why, by the Employment Rights Act 1996 (to which, unless otherwise stated, all section numbers below refer), s112(2), they must be considered first. The Tribunal's jurisdiction to make a re-employment order arises if the complainant requests such an order: s112(3). By s112(4), the Tribunal is mandated, where no re-employment order is made, to make "an award of compensation ...".

21. In s113 the two re-employment options are listed: reinstatement and re-engagement, in that order.

22. By s114(1), a reinstatement order is defined as an order "that the employer shall treat the complainant in all respects as if he had not been dismissed." By s114(2) the Tribunal when making a reinstatement order must:

... specify –

- (a) **any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination and the date of reinstatement,**
- (b) **any rights and privileges (including seniority and pension rights) which must be restored to the employee, and**
- (c) **the date by when the order must be complied with.**

If, but for the dismissal, the complainant would have benefited from an improvement in his terms and conditions, the reinstatement order "shall" require him to be treated as if he had received that benefit, from the date on which it would have taken effect (s114(3)).

23. Re-engagement involves engaging the employee in employment comparable to that from which he was dismissed, or other comparable employment (s115(1)).

24. Dealing with the choice of re-employment orders, s116(1) includes:

... the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account –

- (a) **whether the complainant wishes to be reinstated,**

- (b) whether it is practicable for the employer to comply with an order for reinstatement, and**
- (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.**

25. I concluded that it was right and proper to make a reinstatement order in favour of each of the Claimants. They all genuinely wished to be reinstated and there was no question of them causing or contributing to their dismissals. Of the specific factors listed in s116(1), practicability of compliance alone was relevant. As to that, I was mindful that there is, as the EAT has put it<sup>1</sup>, no statutory presumption of practicability. At the stage of analysis at which I found myself, there was no burden on the Respondents to prove impracticability. That said, it is in the nature of things that the evidence on which practicability is assessed will generally come at least in large part from the employer's side. Indeed, the employee(s) will rarely be in possession of the sort of information on which useful evidence on the subject may be based. Accordingly, without treating the employer as under a legal burden, the Tribunal is entitled to look to that party to provide convincing evidence.

26. I have pointed out the large gaps in Mr Brady's evidence. He was an honest witness but not a persuasive one, given his lack of 'hands-on' experience of the individual Camden contracts. I accept his evidence that no exercise to recruit security staff for Camden contracts is currently underway, but that does not conclude the practicability point. As I have noted, Mr Brady could not help on a range of potentially significant points. It is not clear how much slack there is in the system. It may well be that gaps are still being filled by 'bench officers'. It seems that some Camden staff are still retained on 'zero hours' contracts (Mr Brady could not directly challenge Mr Mann on this point). And there may well be scope for transferring Camden staff to contracts elsewhere to accommodate the reinstatement of the Claimants. These possibilities all arise before one confronts (if necessary) the argument that staff appointed as direct or indirect replacements for the Claimants (all or most of whom will have less than two years' qualifying service) should be displaced to make way for them. On the material available, I find that it is practicable to reinstate the Claimants.

27. The remedy claimed involves an exercise of discretion. I had regard to all the circumstances, not only those listed in s116(1). Here too it seemed to me that wider considerations of justice favour reinstatement. It was not in dispute that the Claimants gave dedicated service, many over a significant period. It is not (and cannot be) in question that they were dismissed unceremoniously and without the first beginnings of a reasonable process. The jobs which they lost were of great value to them, not only because of the security of knowing that the pay rate would not fall below the LLW but also because they found the work interesting and rewarding. And compensation would provide a poor alternative remedy. They would receive sums which bore little if any relation to the financial losses actually sustained, be permanently deprived of congenial and relatively well-paid work, and be left facing an uncertain future in the job market.

28. For all of these reasons, having stepped back and reviewed all the material

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<sup>1</sup> *First Glasgow Ltd v Robertson* EATS/0052/11

put before me, I was satisfied that the justice of the case was met by awarding the Claimants the primary remedy which the legislation offers.

29. In the case of Mr Da Silva, I have made a reinstatement order. That is on the premise that, had he not been dismissed, he would have been assigned to the RSPU when the HPU was disbanded and that the (apparently minor) change in duties would have been achieved without any variation of his contract of employment. If it were shown that that assumption was mistaken, I would if necessary vary my order to one for re-engagement to the RSPU.

30. Having heard my decision on the question of reinstatement, the representatives asked for time to consider the implications and confer.

31. Following an adjournment, I was asked to rule on a point of pure law: did the uplift (if any) under the Trade Union & Labour Relations Act 1992 ('the 1992 Act'), s207A attach to any arrears of pay and/or other benefits payable pursuant to a reinstatement order?

32. By the 1992 Act, s207A(2), the Tribunal has power, in specified circumstances, to increase "any award" in relevant proceedings (which include unfair dismissal proceedings) by up to 25% on account of the employer's unreasonable failure to follow a "relevant Code of Practice".

33. Mr Hitchens, supported by Mr Powlesland and Mr Mann, submitted that the word "award" had an ordinary meaning. There was no reason to construe it narrowly. It plainly extended to an award of back pay made pursuant to a reinstatement order.

34. Mr Keenan submitted that the Claimants' arguments confused the re-employment and compensatory regimes, which are entirely separate. Back pay was not an "award".

35. For a number of reasons, I was in no doubt that Mr Keenan's submission was to be preferred. In the first place, it is plain that Parliament has deliberately separated the remedies of re-employment orders on the one hand and compensation on the other. The arrangement of the 1996 Act, ss112-126 speaks for itself.

36. Secondly, the separation just mentioned explains why the 1996 Act reserves the language of "award" and "compensation" for circumstances where the compensatory regime is engaged but, in s114(2), prescribes a duty only to "specify" the relevant back pay. There is no power to "make an award" of back pay because that would be inappropriate. The effect of reinstating an employee is that he or she is entitled to be treated as if never dismissed (s114(1)). The requirement to pay arrears follows naturally, and the duty to "specify" the sum, rather than "award" it or, as in a complaint of unauthorised deductions from wages under the 1996 Act, Part II, "order" payment of it, is designed simply to ensure clarity as to the precise sum. The two regimes intersect in s117, which empowers the Tribunal, subject to certain conditions, to make an "award of compensation" and an "additional award of compensation" in circumstances where a re-



employment order has been made and the employer has not complied with it. The provisions of that section accentuate the divide to which I have referred, requiring the Tribunal to impose a compensation-based outcome where the employer has failed to engage with its first choice of a re-employment order. Likewise, s124A, concerned with the order of adjustments to awards of compensation, says nothing about payments of back pay pursuant to re-employment orders.

37. Thirdly, although there is no authority directly in point, the case-law, such as it is, favours the Respondents' argument. In *Oxford Health NHS Foundation Trust v Laakkonen & others* UKEAT/0536/12, the EAT held that the remedies of re-employment (in either form) and compensation were mutually exclusive and accordingly the Employment Tribunal had had no power to make a basic award when ordering reinstatement. I have been shown no decided case that supports the Claimants' contentions.

38. Fourthly, there is no good reason to suppose that the use of the language of compensation in the 1992 Act, s207A (which was inserted by the Employment Act 2008) was accidental.

39. Fifthly, the jurisdictions to which the 1992 Act, s207A apply (see schedule A2) are all concerned with payments intended to remedy a wrong. As I have explained, in my view back pay does not have that character. Payment of back pay is merely one step in the process of implementing a reinstatement order, which is the measure by which the Tribunal seeks to remedy the wrong of unfair dismissal.

40. Sixthly, the suggestion that denying the Claimants an enhancement under the 1992 Act, s207A works injustice and cannot have been intended is unsustainable. They enjoy the counterbalancing benefit of the fact that the ordinary rules governing compensation do not apply to back pay. In particular, the statutory maxima applicable to compensation awards under the 1996 Act, s124 are not applicable to any back pay element and, although provision is made for setting off sums earned in mitigation (ss114(5) and 115(3)), there can be no reduction of sums "specified" as back pay on account of a failure to mitigate loss (see *City & Hackney Health Authority v Crisp* [1990] ICR 95 EAT).

41. It follows that the possibility of an uplift does not even theoretically arise. I would add for completeness that it is by no means clear to me that any "relevant code" applied on the facts of this case, but I was not asked to make any ruling on that question and therefore do not do so.

#### *Further conduct*

42. Having heard my adjudication on the uplift issue, the representatives engaged in a useful dialogue on case management, which resulted in agreement as to the form of the judgment (see para (5) of my judgment above). In accordance with the guidance of the Court of Appeal in *O'Laoire v Jackel International Ltd* [1990] ICR 197 (Lord Donaldson MR), it does not specify the sum to be paid as back pay because the Tribunal cannot be sure that reinstatement will take place on the stipulated date (27 December). It could

happen earlier.

43. The representatives were also agreed on the further case management matters to which my judgment, paras (7)-(10) refer.

44. The further hearing is intended to facilitate the determination of the holiday pay claims and any outstanding remedies issues as well as any costs or preparation time application(s) that may be made.

45. I greatly hope that the parties can now resolve all that is left in the case privately. If so, I will be happy to issue separate final judgments in respect of each Claimant by consent, without the need for them to attend on 6 February.

46. Two final administrative matters. First, the Tribunal has received a request from Mr Touati for all Tribunal correspondence to be copied to him. The Tribunal staff have been instructed accordingly, although it is not clear to me why this is necessary as Mr Mann has very kindly agreed to stand as the point of contact for all five Claimants for whom he spoke before me. Second, Mr Keenan told me that he was due to leave Peninsula very soon and kindly promised to do his best to ensure that the file was safely entrusted to a fresh representative before he left and that the new name and contact details would be sent to the ET and the other parties without delay.

EMPLOYMENT JUDGE – Snelson  
22<sup>nd</sup> Nov 2019

**Judgment sent to the parties on  
25/11/2019**

**For Office of the Tribunals**

## **APPENDIX**

### **LIST OF CLAIMANTS AND CASE NUMBERS**

2201802/2018	Miss C Huggins
2204435/2018	Mr O Emuemukoro
2204648/2018	Mr S Sonu
2204576/2018	Mr N Touati
2204668/2018	Mr C Babalola
2204688/2018	Mr I Da Silva
4104481/2018	Mr S Alaughe